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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,
—and—
JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,
Appellants,
v.
ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT OF APPELLANTS GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

(Signatures on page 2 of cover)

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J. SHANE CREAMER
Attorney General
Commonwealth of Pennsylvania
State Capitol
Harrisburg, Pennsylvania
Attorney for Appellant, Grace Sloan.

WILLIAM BENTLEY BALL
JOSEPH G. SKELLY
127 State Street
Harrisburg, Pennsylvania, 17101
Attorneys for Appellants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Seth W. Watson, Jr., and Anne P. Watson.

JAMES E. GALLAGHER, JR.
C. CLARK HODGSON, JR.
1300 Two Girard Plaza
Philadelphia, Pennsylvania, 19102
Attorneys for Appellants, Daniel F.X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann.

Of Counsel:

WILLIAM D. VALENTE
Villanova, Pennsylvania, 19085

STRADLEY, RONON, STEVENS AND YOUNG
Philadelphia, Pennsylvania, 19102

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OCTOBER TERM, 1972

No.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,
—and—
JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,
Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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JURISDICTIONAL STATEMENT

Appellants appeal from the final Order entered on July 21, 1972, by a District Court panel of three judges, perpetually enjoining the Appellant Grace Sloan, and her successors in office, from paying any funds of the Commonwealth of Pennsylvania pursuant to Act 92 of

August 27, 1971, known as the Parent Reimbursement Act for Nonpublic Education, to parents of children attending nonpublic schoole.

OPINION BELOW

The only Opinion of the three-judge District Court for the Eastern District of Pennsylvania in this case was entered on April 6, 1972, prior to joinder of issue by Answer in the case, and as the basis for denial of motions to dismiss made by Appellants (Defendants below). The District Court's Order of July 21, 1972, recites said Order (disposing of a later Motion for Summary Judgment) to be in accordance with that Opinion. The Opinion is reported in 346 F.Supp. 1356 (1972).

JURISDICTION

This action was brought pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202 to enjoin the enforcement of a statute of the Commonwealth of Pennsylvania as being in violation of the First Amendment to the Constitution of the United States. The final decree of the District Court was entered on July 21, 1972, and is set forth in the Appendix hereto, at page 1a. Appellants Diaz, Zimmerspitz, Kretzmann, Harvey, Powell and Watson filed their Notice of Appeal in the District Court on August 8, 1972; Appellant Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, filed her Notice of Appeal on August 14, 1972. Copies of both Notices of Appeal are set forth in the Appendix at pages 18a and 19a respectively.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28 U.S.C., Sections 1253 and 2101(b). The most recent case sustaining the jurisdiction of this Court to

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review the judgment in this case on direct appeal is *Lemon* v. *Kurtzman,* —— U.S. ——, 32 L. ed. 2d. 330 (1972).

STATUTE INVOLVED

The statute involved is Act 92 of the Laws of Pennsylvania, 1971, known as the Parent Reimbursement Act for Nonpublic Education, the full text of which is set forth in the Appendix, commencing at page 20a.

QUESTIONS PRESENTED

The Act provides that the parent of a child who has completed the preceding school year in a nonpublic school in which the requirements of the compulsory school attendance law and of Title VI of the federal Civil Rights Act of 1964 are met, and for whom the parent paid tuition, shall be entitled to receive a reimbursement payment limited to $75.00 (if the attendance was in a elementary school) or $150.00 (if the attendance was in a secondary school). This payment to the parent is not earmarked for any school and may be used by the parent unrestrictedly, in any way that he desires, whether for education, family maintenance or otherwise.

1. Does this Act have a primary effect that advances religion?

2. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic non-church related school deny such parent the equal protection of the laws?

3. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic church-related school deny such parent the equal protection of the laws?

STATEMENT OF THE CASE

1. The Statute Involved

Act 92 of 1971 provides that the state shall make payments to any parent who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The specified payments are in the flat amount of $75.00 for an elementary school student and $150.00 for a high school student. The payments are not payments of tuition, and are in no way related to the tuition scales of different schools or to the amount of tuition costs incurred by any particular parent. The payments are not required by the statute to be paid over to any school or devoted to educational uses: the parent receives them unearmarked and without any attached condition as to their disposition. The student must have been enrolled in a school wherein the requirements of the compulsory attendance law may be fulfilled and which meets the requirements of Title VI of the U. S. Civil Rights Act of 1964.

In accordance with the Act, the Pennsylvania Assistance Authority reimburses the parent on the basis of the parent's verification that he had paid tuition for the past school year for a child enrolled in a nonpublic school as defined in the Act. (Section 6). The Act specifically precludes the Authority from exercising any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools". (Section 4).

In Section 2 the Pennsylvania General Assembly stated its purpose in enacting Act 92:

> ". . . in order to reimburse parents partially for this service so vitally needed by the Common-

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wealth, and in order to foster educational opportunity for all children . . ."

The word "service", refers back to the concluding sentence of subparagraph (4) of Section 2:

"Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

The premises upon which that conclusion rests are set forth in legislative findings contained in the four subsections of Section 2:

1. Parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.
2. The welfare of the Commonwealth requires that children be assured ample opportunity to develop their intellectual capacities.
3. Inflation and rising educational cost now imperil the ability of parents to continue to support nonpublic education.
4. Any substantial transfer of nonpublic school children to public schools in Pennsylvania will entail an intolerable public financial burden and seriously jeopardize present standards of public education.

Act 92, as a bill in the legislature, was known as House Bill 1379. The bill, with 67 sponsors, passed both the House and the Senate with comfortable majorities.[1] It was signed into law by the Governor on August 27, 1971.

[1] H. 1379 passed the House by a vote of 132 to 63. It was then amended in the Senate (to change the percent of tax revenue in Section 5 from 25% to 23%) and passed as amended by a vote of 36 to 12. The bill was then returned to the House for concurrence where it passed by a vote of 173 to 16.

2. The Proceedings Below

On September 13, 1971, the Appellees (the Plaintiffs below) brought this action, naming the State Treasurer as defendant. The Complaint alleged that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against the paying of any funds pursuant to the Act.

Thereafter, twelve parents, having children enrolled in nonpublic schools in Pennsylvania, moved under Rule 24(a) for intervention of right as parties defendant, stating that, by virtue of being prime beneficiaries of the Act, they had an interest in the subject of the action distinct from that of the named party defendant, the State Treasurer. Ten of these parents are parents of children in nonpublic schools which are church-related, while two of the parents, Seth W. Watson and Anne P. Watson, his wife, are parents of a child who attends a nonsectarian, nonpublic school. The District Court granted the parents' Rule 24(a) motion.[2]

All parties defendant then moved, under Rule 12(b)(6), to dismiss the Complaint for failure to state a claim upon which relief can be granted. The District Court, on April 6, 1972, issued an Order that the motion to dismiss be denied. Although at this point no Answer had been filed, nor any motion for judgment by plaintiffs, the Order was accompanied by an Opinion declaring the Act unconstitutional under the Establishment Clause. That is the only Opinion which has been rendered in the case. Its contents are discussed *infra*.

On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint

[2] The separate intervention of a parent, Henry E. Crouter, was likewise granted.

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relating to the Free Exercise and Equal Protection Clauses. (Appendix, page 16a). On the same date the defendant Grace Sloan, State Treasurer, filed her Answer to the Complaint. On May 1, 1972, the parent intervener defendants Jose Diaz, *et al.*, filed their Answer to the Complaint, stating that to deny any intervener defendants the benefits of the Act solely because their children attend church-related schools, or to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic non-church related schools, would be to deny such intervener defendants the equal protection of the laws.

The defendants Seth W. Watson and Anne P. Watson, his wife, on May 3, 1972, moved for summary judgment. Their motion was supported by an affidavit which disclosed that they are eligible to receive payments under the Act and are parents of a child who is enrolled in a nonpublic non-church related school. The Court, on June 20, 1972, denied this motion without oral argument on the ground that "the plaintiffs seek no relief against the interveners Seth W. Watson, Jr., and Anne P. Watson, his wife". In the same Order the court requested oral argument on the question of whether the Act "can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related". (Appendix, page 16a). The plaintiffs also moved for summary judgment on May 3, 1972. On July 21, 1972, the District Court granted that motion, "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith..." (Appendix, page 17a).

The intervener defendants Jose Diaz, *et al.*, on July 31, 1972, moved that the judgment be amended on the ground that there was no evidence in the record to support the Court's foregoing statement and, further, on the ground that the Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public. On August 4, 1972, the Court denied that motion.

Thus, although its Opinion of April 6, 1972, was rendered prior to the Answer of the parent interveners which raised Equal Protection claims, the court below never issued a subsequent opinion addressing itself to those claims. Furthermore, after ruling on the Motions to Dismiss, and denying the Motion for Summary Judgment by Seth W. and Anne P. Watson, and the court having asked for argument on the issue of whether the Act was severable in its application to them, the court, nevertheless, omitted to render any opinion respecting that issue.

The Opinion of the District Court states that the Supreme Court has developed three tests for determining whether a particular program offends the Establishment Clause: (1) whether the statute has a "secular legislative purpose", (2) whether "its principal or primary effect [is] one that neither advances nor inhibits religion", and (3) whether the statute fosters "an excessive government entanglement with religion". (Appendix, page 5a). The District Court found that Act 92 passed the first test. The Court did not apply or discuss the third test. The Court said that the Act violates the Establishment Clause for the following reasons:

1. ". . . the effect of the Act is to aid the schools and therefore the failure of the state to insure that

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the funds are restricted to secular education or general welfare services renders the Act unconstitutional." (Appendix, page 12a).

2. ". . . even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children." (Appendix, page 14a.)

THE QUESTIONS ARE SUBSTANTIAL

Act 92 is a unique statute, providing a program not hitherto reviewed by this Court. There can be no doubt that it is important legislation, since it is the response of a heavy preponderance of the legislature [3] of one of the most populous and socially representative [4] states of the Union to a problem which many leaders of our nation have deemed to be of great consequence.[5]

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[3] See p. 5 *ante* for recapitulation of the vote in both houses.

[4] Pennsylvania, third in population among the fifty states, is both an industrial and an agricultural state, extending from the Atlantic seaboard to the Midwest. It embraces the great multi-racial population centers of Philadelphia and Pittsburgh, prosperous farming communities, the economically depressed coal regions, railroad towns, and "Appalachia'" regions. It includes some of the foremost banking and financial centers in the nation, and is one of the chief homes of organized labor in the United States. Ethnically, its population is very diverse. Politically, it is about evenly divided between the two major parties. Religiously, its majority is Protestant, the remaining one-fourth of its people being largely Roman Catholic, but with substantial Jewish, Greek Orthodox, and Russian Orthodox numbers. About one-quarter of Pennsylvania children attend nonpublic schools (a majority of which are religiously affiliated schools) while three-quarters are in public schools. See, generally, THE PENNSYLVANIA MANUAL, 1970-1971.

[5] See, *e.g.* Message on Education Reform of the President of the United States, March 3, 1970, 9.

The Act's legislative finding and declaration of intent spell out the following as the core concept of Act 92:

Parents who enroll their children in nonpublic schools wherein compulsory attendance law requirements may be fulfilled thereby contribute to the public welfare, because, *de facto,* they save the state money while, at the same time, providing an education for young citizens. Those two factors can fairly be described as a "service" to the Commonwealth. The Act is aimed at affording financial help to the contribution of this service. The money paid the parents is *unearmarked,* and the parents in question are aided in their overall economy, their households, their economic level. Out of this help they are aided to, but not required to, continue educating their children in nonpublic schools (which includes, of course, church-related schools). Thus the Act fosters "educational opportunity for all children".

1. THE ESTABLISHMENT CLAUSE QUESTIONS

The court below correctly stated the three tests under the Establishment Clause, which this legislation would have to withstand relating, respectively, to "secular legislative purpose", "primary effect that neither advances nor inhibits religion", and excessive "government entanglement with religion". It found Act 92 to fail only the "primary effect" test. This the Court did, first, by saying that the Act provides, in effect, a subsidy to sectarian schools unrestricted to secular objectives, and secondly, that it "encourages" parents to send their children to church-related schools because a "possible and quite likely" use of the payments by the parents will be "to continue to pay tuition at sectarian schools".

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Act 92 cannot be read to spell out a school subsidy. Its reference to schools, school children, education and educational cost do not render it an act subsidizing schools. Anyone familiar with family economics in Pennsylvania at the present hour, realizes that the cost, due to taxation and inflation, of educating children, is a major cost to most parents in the state. But to parents who respond to undeniable commands of conscience by educating their children in sectarian and other nonpublic schools, this cost is particularly burdensome. The legislature, in devising this piece of social legislation, could well take into account that factor, and expressly note it, in writing a provision for family or parental economic relief, without at the same time creating, directly or indirectly, any school subsidy. The aim, in statutory construction, "is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The legislative finding and declaration of policy must and can be read so as to preserve the Act.

In pursuit of its argument that the unearmarked payments to parents are, in fact, subsidies to schools, the District Court reasoned that, since "parents may receive payments [under the Act] solely because they have paid tuition at a church-related school", therefore such payments are, in legal effect, payments of tuition. But no provision of Act 92, directly or by implication, requires a parent to hand the payment over to any school-church-related or otherwise. And the court did not establish (nor could it have) any nexus between the amount of tuition which had been antecedently paid by the parent and the flat, uniform amount of welfare benefit afforded by the Act to all parents of nonpublic school children. No tuitions are paid under this Act.

The lower court well recognized the difficulty of attempting to establish Act 92 as providing a subsidy to sectarian schools, or a tuition earmarked for them. It could not, of course, say that parents *will, in fact,* send their children to sectarian schools due to the payments. So it dealt with the point by saying that they *might.* To resolve the question of whether the Act has any necessary primary effect of advancing religion, the court turned to deemed probabilities, here saying that in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Supreme Court had

> "... found the *possibility* of such [religious] use enough to strike down the provision of the statute which permitted the unrestricted use of the buildings after twenty years. It is clear that a *possible and quite likely use* of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (Appendix, page 13a. Emphasis supplied).

Thus the lower court has interposed a new test (never in fact pronounced by the Supreme Court) for laws respecting an establishment of religion. The Supreme Court has never held any law invalid on the principle that it encourages religion. If that were so, laws providing for tax exemption of churches would be invalid. If that were so, the compulsory attendance laws of all fifty states would be invalid; it is by virtue of such laws that six million children in the United States may legally attend parochial schools. If that were so, the following statements of this Court in *Walz* v. *Tax Commission,* 397 U.S. 664, 671 (1970) must now be deemed repudiated:

> "Surely, bus transportation and police protection to pupils who receive religious instruction *'aid'* that particular religion to maintain schools that

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> plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." *Walz, supra,* at 671. (Emphasis supplied).
>
> "'*When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to our spiritual needs.*'" *Id.* at 672. (Emphasis by the Court).

This Court said, in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971) that "the three evils against which the Establishment Clause was intended to afford protection . . ." are "sponsorship, financial support, and active involvement of the sovereign in religious activity". Neither sponsorship, financial support, or active involvement of the state in religious activity are discoverable in Act 92.

Nor can any rule of "possible and quite likely" serve as a constitutional standard for deciding that an enactment of the legislature of a state is a law respecting an establishment of religion. The parent can indeed pay over to a church money which he receives under the Act; but in that respect he differs in no wise from a recipient of public assistance in Pennsylvania, who likewise may pay over to a church the unearmarked assistance which he receives.

The District Court's use of this Court's decision in *Tilton* v. *Richardson* calls for correction. The Supreme Court, in *Tilton,* did not state any test of "significant risk" or enter upon any formula for the weighing of probabilities that the buildings in question would, or would not, after the twenty year period, be used for religious purposes. The facts of *Tilton* were that

buildings were constructed on sectarian college campuses at public expense and under state restrictions limiting their use to secular functions. The Supreme Court struck down that part of the legislation in question which limited the government's power of recapture to a twenty year period for violation of those restrictions. *Tilton* would be usefully analogous here, only if funds under Act 92 were consigned to sectarian schools, with restrictions (of limited duration) that they be used only for secular purposes. Such is not the case.

Act 92 plainly has no primary effect that advances religion.

2. THE EQUAL PROTECTION QUESTIONS

a. Parents Whose Children Attended Non-Church-Related Schools

Important issues are also presented to the Court by the affirmative defenses raised by the parent interveners. Two of these, Seth W. Watson, Jr. and Anne P. Watson, his wife, are clearly denied the equal protection of the laws by virtue of the lower court's ruling. Even under that court's erroneous view that the Act calls for an illegal subsidy to sectarian schools, the Watson parents, whose child attended a nonsectarian school, must be allowed the benefits of the Act, since in no way can payment to them possibly raise any Establishment Clause issue. The severability clause of the Act expressly states that

> "If a part of this act is invalid, in one or more of its *applications* the part remains in effect in all valid *applications* that are severable from the invalid *applications.*" (Section 10. Emphasis supplied).

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No construction of Act 92, limiting its application to parents whose children attended sectarian schools is possible, the Act (Section 3(2)) defining a "nonpublic school" as *"any"* school wherein, *inter alia,* the compulsory attendance requirements of law may be met. The legislative intent must be primarily determined from the language of the statute itself. *Commonwealth ex rel. Cartwright* v. *Cartwright,* 350 Pa. 638, 645 (1945). To interpret Section 3(2) to read: "any *sectarian* school, other than a public school", is to write a denial of equal protection on the very face of the Act, since no possible basis could be discovered for affording the benefits of the Act to parents whose children met compulsory attendance requirements through a sectarian school while denying them to parents whose children met exactly the same requirements through a nonsectarian school. This discrimination would be highlighted were it to be stated, as did the court below, that parents of nonsectarian school children constitute a minority of the Act's designated beneficiaries. The General Assembly, by providing the foregoing language respecting severance in application, stated its plain intention to preserve the statute for all possible beneficiaries.

b. Parents Whose Children Attended Church-Related Schools

The other intervening parents, Jose and Enilda Diaz, William and Nancy Zimmerspitz, F. Carl and Katheryn Kretzmann, Arthur and Muriel Harvey and Daniel F. X. and Anna T. Powell, are parents whose children attended Catholic, Jewish and Protestant church-related schools. They find themselves confronted by two absolute commands: that of the Compulsory Attendance Law and that of their religious conscience. Act 92 provides a public welfare benefit

in the form of payments to parents who fall within a rationally based class of persons who have particular economic need due to the fact of their supporting both public education and (by virtue of the foregoing commands) nonpublic education. The court below says that a parent must be excluded from participation in the public welfare benefit solely on the ground that, in the previous school year, he chose to have his child fulfill the Compulsory Attendance Law through enrollment in a religious-affiliated school. The court thus sets up religion as the standard for determination of participation in public welfare benefits. This attempt to stretch the Establishment Clause into a suppressant of Equal Protection rights is manifestly mistaken.

The Supreme Court has repeatedly discountenanced the view that the Establishment Clause—though cast in absolute terms—is to be read as an absolute. Instead, it has stressed that the guiding principle of its interpretation is neutrality. *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947); *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970):

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed government acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669.

Intervener Defendants Jose Diaz, *et al.* do not suggest that they have a constitutional right to have the State make payments to parents of nonpublic school children which will enable them better to bear financial

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burdens caused by having to pay taxes for the support of public schools while also having to obey commands of religious conscience through supporting sectarian schools. (*Cf., Brusca* v. *State of Missouri ex rel. State Board of Education,* 332 F.Supp. 275, *aff'd.,* memorandum decision, —— U.S. ——, 92 S.Ct. 1493 (1972). They do, however, say that, where the legislature, in its wisdom, has determined to provide public welfare benefits to all parents within a rationally determined class, the court may not impose a standard which will disqualify certain parents from participating in those benefits *solely because they had exercised a choice —an act of the will—based upon religious conscience,* of schools for their children which public policy says are acceptable schools.

The invidiousness of such classification is highlighted by the following:

1. In any such disqualification, it is the prospect of the *exercise of religious conscience by the parents,* and not actually the religious character of the school, which is determinative. That is because, as has been seen, the schools are not funded under the Act.

2. Those parents are disqualified from receiving, not school tuition payments (none are payable under Act 92), but what are, in fact, *general* assistance payments. Thus the penalty involved in the disqualification extends not only to schooling (should the parent decide to use the money directly for educating his child) but also, for example, to food or clothing or household maintenance (should the parent decide to use the money for such purpose).

3. For many individuals, there is no realistic choice but to obey the mandate which a religious conscience speaks. *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963). For Intervener Defendants, however, that mandate

is coupled with a legal mandate of the State, that, under criminal penalty, a parent must send his child to a school in which the requirements of the Compulsory Attendance Law may legally be met. The court below asserts that the State can no more properly provide funds under Act 92 than it could provide funds to individuals to enable them to operate a church. The flaw in that position lies in part, however, in the fact that the law does not compel people to go to church, while it does compel a parent to send his child to a school (while, in addition, compelling the parent to pay for the support of public schools). Since the lower court did not dispute the legislative judgment that a vast number of parents of nonpublic school children actually need the payments in question (and, in fact, agreed that "the Act expresses a legitimate secular objective" Appendix, page 5a), it is clear that the exclusion from the benefits of the Act of those parents who desire an education for their children in a religiously affiliated school will impede them either in obeying their conscience or in obeying the law.

The effect, then, of the ruling by the District Court, disqualifying a parent because his child attended a sectarian school, is to create two classes of parents indistinguishable from each other except for the fact that the disqualified parent has exercised his religious liberty to educate his child in a school which public policy recognizes for accommodation of the religious conscience.

Classifications based on religion are fully as abhorrent as classification based on race, lineage or alienage. Certainly the interest of Intervener Defendants, both in education and in the exercise of religious freedom, must be deemed a "fundamental interest" for purposes of the Equal Protection Clause.

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CONCLUSION

In view of the foregoing, it is submitted that the District Court was in error in concluding that Act 92 is unconstitutional, and that the questions presented by this appeal are substantial, and of major public importance, warranting plenary consideration by this Court.

Respectfully submitted,

J. SHANE CREAMER
Attorney General
Commonwealth of Pennsylvania
State Capitol
Harrisburg, Pennsylvania
Attorney for Appellant, Grace Sloan.

WILLIAM BENTLEY BALL
JOSEPH G. SKELLY
127 State Street
Harrisburg, Pennsylvania, 17101
Attorneys for Appellants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Seth W. Watson, Jr., and Anne P. Watson.

JAMES E. GALLAGHER, JR.
C. CLARK HODGSON, JR.
1300 Two Girard Plaza
Philadelphia, Pennsylvania, 19102
Attorneys for Appellants, Daniel F.X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann.

Of Counsel:
WILLIAM D. VALENTE
Villanova, Pennsylvania, 19085
STRADLEY, RONON, STEVENS AND YOUNG
Philadelphia, Pennsylvania, 19102

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APPENDIX

APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2223

ALTON J. LEMON, NEAL F. BRACKEN AND BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania

JOSE DIAZ and ENILDA DIAZ, his wife; WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife; F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife; ARTHUR HARVEY and MURIEL HARVEY, his wife; DANIEL F. X. POWELL and ANNA T. POWELL, his wife; and SETH W. WATSON, JR. and ANNE P. WATSON, his wife; and HENRY R. CROUTER, *Interveners*

BEFORE: WILLIAM H. HASTE, Senior Circuit Judge JOSEPH S. LORD, III, Chief District Judge JOHN B. HANNUM, District Judge

Opinion

April 6, 1972

By JOSEPH S. LORD, III, Chief District Judge

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education [1] (the "Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to

[1] Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

28 U.S.C. § § 1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonweath of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania and interveners are eligble for tuition reimbursement payments under the Act.

The Act provides for the reimbusement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act. of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon

[2] Title VI prohibits discrimination on the ground of race, color, or national origin in programs receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.*

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the taxpayers of the state.[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶ 10 Complaint.[5]

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[3] Section 2(4), Act 92, Appendix A.

[4] Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

[5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.

F.R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious char-

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U.S. 1 (1947), *Engel* v. *Vitale,* 370 U.S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."
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> *Tilton* v. *Richardson,* 403 U.S. 672, 677-678; 29 L.Ed. 2d 790, 798 (1971).

---

acter of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "• • • The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp.* v. *U.S.,* 201 F.2d 819, 822 (C.A.6, 1953). *See also Augustus* v. *Bd. of Public Instruction,* 306 F.2d 862, 868 (C.A. 5, 1962), 2A J.Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

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In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613; 29 L.Ed.2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

> "* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra,* at 674, 25 L.Ed.2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon, supra,* 403 U.S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate secular objective consistent with the Establishment Clause. *See Allen, supra,* 392 U.S. 243; *Lemon, supra,* 403 U.S. at 613; *Tilton, Supra,* 403 U.S. at 678-679,

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Al-

though the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Lemon, supra,* 403 U.S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [*Everson, supra, Allen, supra, Waltz, supra*] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton, supra,* 403 U.S. at 679. *See also Walz, supra,* 397 U.S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In *Everson,* the Supreme Court upheld a state which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general pub-

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lic welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra,* 330 U.S.C. at 18.

In *Allen,* the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that

> "* * * either all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In *Lemon,* the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it un-

necessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in *Allen* that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses, that subsidized teachers do not inculate religion*—indeed the State here has undertaken to do so." *Lemon, supra,* 403 U.S. at 619 (emphasis added).

Finally, in *Tilton,* the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However,

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the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Tilton, supra,* 403 U.S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions. Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (*e.g.,* bus rides, public health serv-

[6] The Court also found that the legislation did not foster excessive government entanglement with religion.

ices), even though the aid may facilitate the operation of sectarian schools. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entanglement with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." *Lemon, supra,* 403 U.S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz, supra,* 397 U.S. at 690 (Brennan, J. concurring).

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Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Furthermore, defendants argue that in *Everson* and *Allen* the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and non-religious textbook loans.

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[7] Defendants cite *Hysong* v. *Gallitzin Borough School District*, 164 Pa. 629 (1894), for the proposition that payment of state funds is not unconstitutional because the recipients may use these funds for religious purposes. *Hysong* involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." *Hysong, supra*, 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

First, we disagree with defendants' reading of *Everson* and *Allen*. The critical factor in both cases was that the subsidized school activities were nonideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In *Allen*, the fact that the Court considered the parents and students as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond* v. *Day*, 197 Va. 419, 427, 89 S.E.2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close.

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[8] If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. *See Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

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It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid program. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, *Tilton* established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In *Tilton,* there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9] *Almond* v. *Day, supra, Hartness* v. *Patterson,* 179 S.E.2d 907 (S. Carolina 1971), *Opinion of the Justices,* 259 N.E.2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's

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[9] "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State to the school is transmitted." *Almond* v. *Day, supra,* 89 S.E.2d at 857.

"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." *Hartness* v. *Patterson, supra,* 179 S.E.2d at 909.

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sending his child to a religious school is to insure the early inculcation of religion. *See Walz, supra,* 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable corollary that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See Brusca* v. *State of Missouri ex rel. State Bd. of Ed.,* 332 F.Supp. 275 (E.D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

Order

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of *Lemon* v. *Kurtzman*, 310 F.Supp. 35 (E.D. Pa. 1969).

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic

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schools attend church-related schools, the Act can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

FOR THE COURT

JOSEPH S. LORD, III

Ch. J.

Order

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act For Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

BY THE COURT:

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Notice of Appeal

Notice is hereby given that Intervenor-Defendants in the above captioned matter, Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Kathryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, appeal to the Supreme Court of the United States from the entire order entered July 21, 1972, granting Plaintiffs' Motion for Summary Judgment and perpetually enjoining the Defendant Grace Sloan from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

WILLIAM BENTLEY BALL
Attorney for JOSE DIAZ, ENILDA DIAZ, SETH W. WATSON, JR. AND ANNE P. WATSON,
Intervener Defendants

JOSEPH G. SKELLY
Attorney for WILLIAM ZIMMERSPITZ, NANCY ZIMMERSPITZ, ARTHUR HARVEY AND MURIEL HARVEY,
Intervener Defendants

JAMES E. GALLAGHER, JR.
Attorney for DANIEL F. X. POWELL AND ANNA T. POWELL,
Intervener Defendants

C. CLARK HODGSON, JR.
Attorney for F. CARL KRETZMANN AND KATHRYN L. KRETZMANN,
Intervener Defendants

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Of Counsel:

BALL & SKELLY
127 State Street
Harrisburg, Pa. 17101

STRADLEY, RONON, STEVENS & YOUNG
1300 Girard Plaza
Philadelphia, Pa. 19102

WILLIAM D. VALENTE
Villanova, Pa. 19085
August 7, 1972

Order

AND NOW, this 4th day of August, 1972, it is ORDERED that the motion of JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHRYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, and SETH W. WATSON, JR. and ANNE P. WATSON, his wife, to amend the order of July 21, 1972 be and it hereby is DENIED.

FOR THE COURT

JOSEPH S. LORD, III
Ch. J.

Notice of Appeal

Notice is hereby given that Defendant in the above captioned matter, Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania, appeals to the Supreme Court of the United States from the entire order entered July 21, 1972, granting Plaintiffs' Motion for Summary Judgment and perpetually enjoining the Defendant Grace Sloan from paying any funds of the Commonwealth of Pennsyl-

vania pursuant to Act No. 82 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

J. SHANE CREAMER
Attorney General

J. JUSTIN BLEWITT
Deputy Attorney General
Attorneys for Defendants

August 8, 1972

No. 92
AN ACT

HR 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Common-

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wealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to chose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following

meanings, except in those instances where the context indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however, That it shall exercise no di-

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rection, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P.L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbusement hereunder, the parent of a student shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year

and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents. —Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a willfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the

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reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A. D. 1971.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DELORES TUCKER
Secretary of the Commonwealth.